



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

**ELECTRONICALLY
SIGNED**

SIGNATURE

DATE: 25 February 2021

Case No: 29899/2018

In the matter between:

SONTO ELIZABETH MASHELE

Applicant

and

BMW FINANCIAL SERVICES (PTY) LTD

First Respondent

**THE SHERIFF OF THE HIGH COURT,
JOHANNESBURG EAST**

Second Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

WILSON AJ:

- 1 The applicant (“Ms. Mashele”) seeks leave to appeal against my judgment in *Mashele v BMW Financial Services (Pty) Ltd and Another* (29899/2018) [2020] ZAGPPHC 665 (18 November 2020).

- 2 The application for leave to appeal (“the application”) was lodged on 24 November 2020. It was set down for hearing on 1 February 2021. Counsel for the parties filed concise written submissions shortly before the hearing, to which I had regard and for which I am grateful.
- 3 Because of the ongoing risk of transmitting the COVID-19 virus through close physical contact, the application was set down for hearing online by video conference. However, shortly before the matter was due to be called at 09h30 on 1 February 2021, it became apparent that the Court’s internet connection had temporarily malfunctioned, meaning that my registrar was unable to host and record the hearing from her High Court office. Despite her commendable efforts to do so, she was unable to secure an alternative connection through which to host and record the hearing.
- 4 It was accordingly not possible to hear the matter remotely at the allocated time. The application had to be removed from the roll.
- 5 While this was being arranged, counsel indicated to me that a settlement agreement had been reached between the parties, and that the agreement was embodied in a draft consent order (“the draft”). I gave leave for the draft order to be uploaded to Caselines, together with the various letters of consent required by the Practice Manual. I indicated that, if the draft was appropriate on its face, I would make it an order of court without further submissions from the parties.
- 6 The draft was uploaded shortly thereafter, but the letters of consent required in terms of the Practice Manual were not.

- 7 The draft requires Ms. Mashele to pay R235 000 to the first respondent (“BMW”) by 25 February 2021, and makes provision for the execution of the default judgment I refused to rescind, together with the payment of interest and costs in the event of non-performance of that obligation. The draft also requires Ms. Mashele to pay the costs of the application for leave to appeal. It asks that I declare that BMW has complied with various statutory provisions that go well beyond the provisions that were in issue in the main rescission application. The draft does not set out the order I should make on the application for leave to appeal.
- 8 Having reviewed the draft, I required that the parties file written submissions, addressing the following issues –
- 8.1 Whether it is competent to make the draft an order of court in the context of leave to appeal proceedings.
- 8.2 What order, if any, should be made on the application for leave to appeal.
- 8.3 On what basis I am invited to order Ms. Mashele to pay the costs of the application for leave to appeal, in circumstances where I made no order as to costs in the main rescission application.
- 8.4 On what basis I am invited to direct Ms. Mashele to pay costs incurred by BMW in recovering money due in terms of the agreement on the scale as between attorney and own client, in circumstances where (1) I made no order as to costs in the main

application and (2) the agreement is to pay the costs of future action which may never be taken.

- 8.5 Whether an order to pay costs of any future enforcement action on the scale of attorney and own client will interfere with the discretion of any court that may in future be seized with that action, and whether, if it would, that interference would be appropriate.
- 8.6 Whether it is competent or necessary for me to grant BMW leave to execute on the warrant for the delivery of the vehicle without further notification to the defendant.
- 8.7 Whether the order in paragraph 6 of the draft is necessary, given that it appears simply to re-state the law, and whether, if it does not simply restate the law, it is competent.
- 8.8 On what basis I am invited to declare that BMW has satisfied the provisions of the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 “in each and every respect”, in circumstances where the issue before me in the main rescission application was whether BMW had complied with the provisions of sections 129 and 130 of the National Credit Act, and no argument of any nature has been addressed to me on any other issue relating to compliance with either statute.
- 8.9 Whether, in the opinion of either party, the content of the draft, and any submissions that may be made on it, will require ventilation at a further hearing.

- 9 In respect of the aborted hearing of 1 February 2021, I removed the application from the roll with each party paying their own costs.
- 10 BMW's counsel filed written submissions on 8 February 2021. Ms. Mashele's counsel filed written submissions on 12 February 2021.
- 11 Both sets of submissions proceeded on the basis that the application is no longer being actively pursued.
- 12 BMW went so far as to suggest that I am *functus officio*, and need take no further action on the application. It was submitted on Ms. Mashele's behalf that Ms. Mashele has "had an opportunity to duly consider the contents of the draft order and her wish is that it will reflect her undertakings" to BMW (paragraph 6). If so inclined, I am invited in Ms. Mashele's submissions, to direct the parties to conclude a formal settlement agreement that complies with the applicable court rules and the provisions of the Practice Manual. Neither party asks for a further hearing either on the merits of the application, or the content of the draft.
- 13 The position that the parties have adopted leaves much to be desired. I am seized with an application for leave to appeal. The application has not been withdrawn, but neither party seems to be willing to say what order I should make on it. Neither party seriously suggests that I make the draft an order of court either, at least not in its current form. It is in any event clear to me that I cannot do so. I have no satisfactory evidence that the order is actually agreed to, and several provisions of the order seem to me to be contrary to public policy.

- 14 Be that as it may, the parties are free to arrange their affairs as they see fit. For at least the reasons I have given, I am not inclined to place the Court's imprimatur on the draft. If the agreement it embodies has actually been reached, any dispute arising from it will have to be the subject of further proceedings before another Judge.
- 15 The only question before me is what order is to be made on the application. In this respect, I do not accept that I am *functus officio*, unless and until the application has been withdrawn or ruled upon. It is not in the interests of justice that the application be left hanging in the air.
- 16 It is not clear to me what form of agreement, if any, has been reached between the parties. Nor is it clear to me that the agreement is enforceable in all its respects. However, it is clear that neither party is interested in the determination of the application on its merits. Another, extra curial, manner of resolving the dispute appears to have been found.
- 17 For that reason alone, the application falls to be dismissed as moot.
- 18 Were I to have entertained the application on the merits, I would have, in any event, dismissed the application as bearing no prospects of success. There is nothing in the parties' written submissions on the merits of the application that creates any reasonable apprehension in my mind that another court would have decided the rescission application differently.
- 19 For the reasons I gave in my judgment on the rescission application, the small variances in the extent of Ms. Mashele's indebtedness to BMW had no effect on BMW's right to obtain judgment for the repossession of the vehicle

at issue in the manner that it did. There was no question, on the facts of this case, of enforcement of the credit agreement between the parties being precluded by sections 129 or 130 of the National Credit Act 34 of 2005, unless Ms. Mashele could demonstrate that she brought her payments under the credit agreement up-to-date at some point after 28 January 2016. On the papers before me, that never happened.

20 Accordingly, the application for leave to appeal is dismissed. As in the main application, each party is to pay their own costs.

S D J WILSON

Acting Judge of the High Court

This ruling is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 February 2021.

DATE OF JUDGMENT: 25 February 2021

For the Applicant: BM Khoele
Instructed by AM Nduna Attorneys

For the First Respondent RG Bowles
Instructed by MacRobert Incorporated